University of Miami Inter-American Law Review

10-1-1975

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> If ever a breach of the law called for reform it is the law relating to estate duty. It ought to be certain: it ought to be sensible — it is neither.[1]

One of the less sensible areas of estate duty law in the Commonwealth Caribbean concerns the valuation of gifts made *inter vivos*. It is a standard part of estate duty legislation that gifts made within a certain period before the death in question should be deemed to have remained part of the estate, and to have passed on the death of the donor. The relevant period varies within the Commonwealth Caribbean,[2] but the object is of course the same—to prevent the avoidance of estate duty by means of gifts made prior to death.

Commonly, this type of legislation provides that the property given within the relevant time period should be valued, for the purposes of assessing the estate duty payable, at the time of the death of the donor. It therefore follows that if the property is worthless or no longer exists at this time, no duty can be levied in respect of it.

Pinson states that this "facilitated the avoidance of estate duty by what came to be called the 'disappearing trick'."[3] Another writer, Morcom refers to the "Dead Horse Scheme," whereby the gifted property disappeared and reappeared in other forms, such as "redeemable stock."[4] This name was suggested by the fact that the classic example of the "disappearing trick" was that of a gift of a racehorse which died before its donor. The racehorse having disappeared, no duty was payable.[5]

It is apparent from the foregoing that there are various possibilities:

(I) The gifted property may just become completely worthless, as where the horse died. This can only happen where it is inherent in the nature of the gift that it can disappear of its own accord;

(II) the property may become less valuable — a partial disappearance. The horse has been put out to pasture or shares have declined in value, for example;

(III) the property has disappeared and reappeared in another form, as in the example given by Morcom. This is really another version of (I), since the property, *in its original form*, has become worthless. In other words, the horse has been reincarnated. The question which the law must answer is whether estate duty can be levied on the value of the reincarnated horse.

A recent Barbadian decision, *In the matter of the Estate of Webster*[6] has provided an excellent illustration of the "Dead Horse Scheme" in action, in this case the dead horse being debentures which were reincarnated in the form of shares prior to the death the donor.

The donor and subsequent deceased, Mr. Webster, was the owner of four separate properties on the island of Barbados. A company was incorporated under the name of Moncrieffe Ltd., and the following day Mr. Webster sold these properties to the company for the sum of BD$150,000, which was satisfied by the issue of debentures in favour of certain of his relatives. These relatives, Mr. Webster's son and three grand-children, later became the petitioners in these proceedings.

Approximately one month after the debentures had been issued, they were converted into shares in the company, and, again approximately one month later, Mr. Webster died. In assessing estate and succession duties on his estate, the Commissioner included the $150,000 as gifts *inter vivos.* The petitioners appealed to the High Court against this assessment.

The position is governed by section 7 of the Estate and Succession Duties Act, 1941, which states that property passing on a death shall be deemed to include, *inter alia,*

> (d) property taken as a *donatio mortis causa* made by the deceased or taken under a disposition made by him purporting to operate as an immediate gift *inter vivos,* whether by way of transfer, delivery declaration of trust, or otherwise, which shall not have been *bona fide* made three years before his death . . .[7]

The gift of the debentures clearly came within this section, as the deceased had died nearly immediately afterwards.

However, section 14(1) of the 1941 Act states—

> The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property

> would fetch if sold in the open market at the time of the death of the deceased.[8]

The argument for the petitioners was simple. Since the property in question was the debentures, and the debentures had been surrendered, they were worthless at the time of the death and therefore it was not possible within the terms of the Act to levy duty in respect of them.

Property which is the subject-matter of a gift must be valued at the time of the death, irrespective of who then owns it.

For example:

> X gives Y a diamond ring. Y sells it for $100. X dies within the relevant period and at the time of his death the ring is valued at $200. Estate duty is payable on $200.

The question in *Webster* was whether the debentures could be traced into the shares, and duty levied on the value of the value of the shares accordingly.

In support of his argument that this was not permissible, counsel for the petitioners cited the House of Lords case of *Sneddon v. Lord Advocate,*[9] which turned on the construction of what was then identical legislation in the United Kingdom, sections 2(1)(c) and 7(5) of the Finance Act, 1894. In *Sneddon,* the deceased had paid the sum of £5,000 to trustees with directions to hold and apply the same "or investments representing the same" on certain trusts. The trustees bought some shares which were worth £9,250 at the date of the death. The majority of the House of Lords held that the relevant sum for the purposes of estate duty was the £5,000 and not £9,250. Lord Reid made the following crucial statement.

> I find myself unable to regard, say, securities received from the donor and sold as the same property as other securities which have been bought with the proceeds of the sale of the first.[10]

Counsel was certainly correct in citing *Sneddon* as support for his argument, since it did in fact change the practice which had pertained in the United Kingdom during the previous year.

In July, 1953, the Commissioners had issued a statement that they had been advised that where the gifted property had changed in form, duty could be levied on the proceeds of the sale of the property of investments representing them.[11] The advice was based on S.22(1)(f) of the Finance Act, 1894, under which "property" was described as including "the proceeds and sale thereof." As Dymond succinctly says, "(t)his practice was short-lived;".[12] Following *Sneddon,* in March, 1954, the Commissioners issued the following statement:

> In future, the Estate Duty in respect of property taken under a disposition purporting to operate as a gift *inter vivos* will be regarded as imposed upon the property originally given . . . in this context the word 'property' will not be given the extended meaning assigned to it by S.22(1)(f) of the Finance Act, 1894.[13]

Sneddon was also accepted by the High Court of Australia in the case of *Gale v. Federal Commissioner of Taxation,*[14] in which that court declined to say that a gift or settlement of money *inter vivos* should be treated as the money or property into which such gift can be traced at the time of the death. In other words there is no power to follow the money or property into the form it has then taken.

As the Chief Justice pointed out in *Webster,* the assessment of estate duty necessitates two things:

(I) The ascertainment of the subject-matter of the gift; and

(II) the valuation of that subject-matter at the time of the death of the donor.[15]

With reference to the first point, the Crown argued in the following way. The petitioners had freely substituted something for the property which they had been given, in that they had changed debentures for shares. This was a change in name and form only and did not "affect the substance of the transaction." *In re O'Brien; Little v. O'Brien*[16] was referred to in support of this argument, but this was a case on the construction of a will, made by a testator who had directed his trustees to hold some shares in a named company on certain trusts. After his death the company allotted him further ordinary shares as bonus shares and divided the ordinary shares into preferred ordinary and deferred ordinary shares of smaller denomination. It was held that the original shares could be traced into the preferred and deferred ordinary shares, as they had changed in name and form only.

The Chief Justice dealt at some length with this "attractive" argument. His main objection was that different canons of construction apply to Wills and taxing statutes. On the one hand, a will must be construed so as to reflect the intention of the testator, while a statute imposing a tax must be strictly construed.[17]

> Undoubtedly, the principle underlying the estate duty legislation is that a person should be prevented from avoiding death duty on some part of his estate by giving it away within a stated period of his death. However this may be, the statute must be construed strictly and regard must be had solely to the words of the Act.[18]

Here, his Lordship was in fact echoing the well-known words of Rowlatt, J., in *Cape Brandy Syndicate v. I.R.C.*[19]

> In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.[20]

Further, the argument already mentioned, that the definition of the word "property"[21] enabled the shares to be treated as representing the debentures, was rejected by Douglas, C. J., on the authority of *Sneddon.* This definition could not apply to property to be ascertained at a particular moment in time—a phraseology emanating from *Sneddon* itself.

> The provision is not a definition of 'property'; it only provides that 'property' is to have an extended meaning and include 'proceeds of sale,' etc., unless the context otherwise requires. It is really applicable where the Act is dealing with the holding of property for a period, but it appears to be inapplicable where the Act is dealing with property to be ascertained at a particular moment of time. If one is looking for property passing or taken at a particular time, the proceeds of a subsequent sale cannot have passed or been taken at that time because they did not then exist. I therefore think that this provision is excluded by the context here;[22]

However, the decisive factor for the Chief Justice appeared to be the absence of any specific statutory power to trace. In the United Kingdom the "disappearing trick" itself disappeared, the magic words being S.38 of the Finance Act 1957. While not affecting the situation where the property had ceased to exist in any form, in other words, where the horse had died, this section provided the necessary power to trace property into money or other property representing it.

Section (38) (1) provides as follows:

> Where property comprised in a gift *inter vivos* (being neither property settled by the gift, nor a sum of money in sterling or any other currency) is (treated for purposes of estate duty as passing) on the death of the donor, and at some time before the death the donee has ceased to have the possession and enjoyment of any of the property so comprised, then subject to the provision of this section the enactments relating to estate duty in respect of gifts *inter vivos* (including this section) shall apply as if the property, if any, received by the donee in substitute for that property had been comprised in the gift instead of that property (but in addition to any other property so comprised).[23]

His Lordship therefore concluded that the second question—what was the value of the subject-matter of the gift—must be answered on the basis that the debentures had no value whatsoever.

While the logic of the decision is unassailable, an obvious and commonplace question immediately springs to mind—where does one draw the line? Arguably the decision could mean that a cheque cashed before the death of the donor would not attract estate duty. This possibility was alluded to by one leading British tax lawyer, just prior to the amending legislation.

> So long as the decision in *Sneddon* v. *Lord Advocate* is not altered by subsequent legislation . . . , duty will be escaped so long as the settlor lives until the original settled property has become valueless. Thus a debenture which is shortly afterwards repaid, or shares in a building society which are redeemed, or even, possibly, a banker's draft which is quickly cashed, may be utilized as the original property to be settled with a view to avoiding duty on the settlor's death.[24]

The unrealistic distinction between a cheque and the money which it represents is of course known to the law. In *Sibree* v. *Tripp*[25] it was held that a debt could be satisfied for a negotiable security for a lesser amount. The form of the payment introduced a new element. This case was followed in *Goddard v. O'Brien,*[26] in which a cheque for £100 was held to satisfy a debt for £125.7.9. The distinction has naturally been critised, by Cheshire and Fifoot among others.

> This device is technically sound. But in contemporary society the distinction between payment in cash and payment by cheque

> —provided indeed that the cheque is honoured—scarcely accords with business practice.[27]

In the more recent decision of *D and C Builders Ltd. v. Rees*,[28] the English Court of Appeal overruled *Goddard v. O'Brien* and refused to recognise the distinction.

Barbados is not the only Commonwealth Caribbean country to have neglected to introduce the necessary amending legislation.[29] The *Webster* situation could arise in Trinidad and Tobago,[30] Grenada,[31] Dominica,[32] St. Vincent,[33] Montserrat,[34] St. Kitts-Nevis-Anguilla,[35] Antigua,[36] and St. Lucia.[37]

Guyana[38] and Belize,[39] are possible exceptions. In Guyana, S.9(1)(b) of the Estate Duty Act deals with gifts *inter vivos* in terms similar to the relevant provisions in the Barbadian legislation. But there are two important differences:

Firstly "property," is described in S.9 itself and there is an express statement that the definition is for the purposes of that section.

> The term 'property' as used in this section includes immovable and movable property, rights and effects of any kind having their seat in Guyana, and the proceeds of sale thereof, and any investment for the time being representing them . . .

Secondly, there is no equivalent statement that the property must be valued as on the open market at the time of the death of the donor.

The combination of these two factors may well preclude a decision like *Webster* being reached, since it would be very difficult to disregard the express wording of the definition subsection. On the other hand, the Guyanese legislation is silent as to when the property should be valued, which may well create different problems.

One is inclined to prefer the preciseness of the British resolution to the problem. It is difficult to understand why it has not already been emulated within the Caribbean, assuming, of course, that the maximization of estate duty is perceived as desirable.

There is yet another possible approach, one suggested by a recent Australian decision, mentioned by Ford.[40]

It was held by the Board of Review that changes referable to the inherent nature of the property given were to be taken into account for estate duty purposes, but not other changes. Here the subject-matter of the gift was debentures which were redeemed in cash before the death of the donor. This money was held to be dutiable on the ground that it was referable to the nature of the debentures been sold.[41]

This approach would certainly cover the possibility of a cheque being used as the original settled property. Clearly the money received for a cheque is referable to the inherent nature of the cheque! Whether the approach suggested would cover *Webster* is more dubious, and here it might be useful to draw a distinction between debentures which are expressly stated to be convertible and debentures which are not. We are not told anything about the nature of the debentures in *Webster* itself. It is unlikely that it would have made any difference, but the point might be taken in the future, and it is suggested that a debenture which is not expressly convertible is preferable, *ex abundanti cautela,* from the point of view of the estate, rather than the Inland Revenue.

From the point of view of the Inland Revenue, amending legislation is urgently necessary. The device is a relatively simple one, which, if used frequently, would result in a drastic decrease in revenue collected under the estate duty legislation.

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NOTES

[1]*Re Kilpatrick's Policies Trusts* [1966] Ch. 730, at pp 766-767 *per* Diplock L. J.

[2]*e.g.* 3 years—Estate Duty Ord., Cap. 108, R.E. 1958 (Grenada).
Estate and Succession Duties Ord., Cap. 33, no. 5, R.E. 1950 (Trinidad and Tobago).
Estate and Succession Duties Act, 1941, (Barbados).
Estate and Succession Duties Ord, Title XXV, Cap. 10. R.E. 1966 (St. Vincent).
Succession Duty Ord., Cap. 220, R.E. 1957 (St. Lucia).
1 year—Estate Duty Act, Cap. 267, R.E. 1961 (Dominica).
Stamp Act, Cap. 257, R.E. 1961 (St. Kitts-Nevis-Anguilla).
Stamp Act, Cap. 238, R.E. 1952 (Montserrat).
Stamp Act, Cap. 270, R.E. 1962 (Antigua).
Estate Duty Ord., Cap. 45, R.E. 1958 (Belize).
5 years—Estate Duty Act, Cap. 81 23, R.E. 1973 (Guyana).

[3]*Revenue Law,* London, Sweet & Maxwell, 1971, at 22.23.

[4]*Estate Duty Saving and Capital Gains Tax,* London Butterworths, 1969, at p. 56.

[5]The example seems to have appeared in argument during the Scottish case of *Strathcona v. Commissioners of Inland Revenue* [1929] S.C.800. The hypothetical

argument related to a prospective Derby winner which either died or became a "discredited plater" before the death of the donor. The crucial issue was when such a horse should be valued. Lord Clyde found no difficulty in holding that the valuation should be of the prospective Derby winner, in spite of the fact that it did not exist as such at the time of the death of the donor. Lord Sands, on the other hand, insisted on adhering to the strict words of the statute and rejected the delightful idea of placing a value on a 'notional horse.' He found that the actual horse must be valued at the time of the death. Of course if the horse had died it would be valueless. See pp. 806-809.

[6]Unreported decision of the High Court of Barbados, Nos. 396-400 of 1974 before Douglas, C. J.

[7]This sub-section is the Barbadian equivalent of S.2(1)(c) of the Finance Act, 1894 (U.K.), the wording itself being originally derived from S.38 of the Customs and Inland Revenue Act, 1881, as amended by S.11 of the Customs and Inland Revenue Act 1889.

[8]For a decision of the Privy Council on a similar provision in Ontario, see *A.-G. for Ontario v. National Trust Co.* [1931] A.C. 818.

[9][1954] 2 W.L.R. 211.

[10]*Ibid.*, at p. 226.

[11]This advice of course did not relate to the situation where the property had disappeared altogether.

[12]Dymond, R. and John, R. K. "*Dymond's Death Duties*," London, Solicitors' Law Stationery Soc. Ltd., 1955, at p. 47.

[13]See the *Law Society's Gazette*, April, 1954, p. 174.

[14](1959-60) 102 C.L.R. 1. For a discussion of the Australian position, see Ford, *Principles of the Law of Death Duty*, Australia. The Law Book Co. Ltd., 1971, at 6.09.

[15]"...we must take the Act as we find it and the Act appears to me to set too quite distinct problems, the first of which must be solved before one reaches the second. The first is to determine what was the property taken, and, once that problem has been solved, the next is law to value that property" *per* Lord Reid in *Sneddon v. Lord Advocate*, at pp. 225-226.

[16](1964) 115 L.J. Ch. 340.

[17]See *Maxwell* on *The Interpretation of Statutes* (12th ed. Langan) London, Sweet & Maxwell, 1969, pp. 256-258.
cf Odgers 'Construction of Deeds & Statutes' (5th ed. Dworkin) London, Sweet & Maxwell, 1967, pp. 464-466. As Lord Sands stated in *Strathcona v. Commissioners of Inland Revenue* [1929] S.C. 800, at p. 807, "(t)he theory underlying a Revenue Act must bow to its express provisions. . ."

[18]*Webster, supra,* at p 8.

[19][1921] 1 K.B. 64.

[20]*Ibid.*, at p. 71, approved in *Canadian Eagel Oil Co. Ltd v. R.* [1946] A.C. 119.

[21]" 'Property' includes real property and personal property of any kind situate or being in this Island and the proceeds thereof respectively, and any money or investment for the time being representing the proceeds of sale. . ." S.2 of the Estate and Succession Duties Act, 1941 (Barbados).

[22]*Sneddon v. Lord Advocate*, at 225, *per* Lord Reid.

[23]See Beattie, "*Elements of Estate Duty*," London, Butterworths, 1970, at pp. 99-102, for a discussion of the rules laid down by S.38 for identifying the property in respect of which estate duty is leviable.

[24]Wheatcroft, "Settlements Inter Vivos," (1957) *British Tax Review*, 61, at p. 64. He also points out that another commonly used method of avoiding duty is to settle shares in a company which is about to capitalise profits and issue further shares by way of bonus. Here only the original shares attract duty.

[25](1846) 15 M & W. 23.

[26](1882) 9 Q.B.D. 37.

[27]*The Law of Contract*, London, Butterworths, 1972, at p. 83.

[28][1966] 2 Q.B. 617.

[29]In spite of the fact that there has been an amendment to the 1941 Act as recently as March, 1975.

[30]See the Estate and Succession Duties Ord., Cap. 33, no. 5. R.E. 1950.

[31]The Estate Duty Ord., Cap. 108, R.E. 1958.

[32]The Estate Duty Act, Cap. 267, R.E. 1961.

[33]The Estate and Succession Duties Ord., Title XXV, Cap. 10, R.E. 1966.

[34]The Stamp Act, Cap. 238, R.E. 1962.

[35]The Stamp Act, Cap. 257, R.E. 1961.

[36]The Stamp Act, Cap. 270, R.E. 1962.

[37]The Succession Duty Ord., Cap. 220, R.E. 1957.

[38]The Estate Duty Act, Cap. 81.23, R.E. 1973.

[39]The Estate Duty Ord., Cap. 45, R.E. 1958. The structure of the Guyanese and Belizean statutes is identical in this context.

[40]"*Principles of the Law of Death Duty*" at p. 105.

[41]Forde states that "[t]his reasoning does not resurrect the tracing doctrine discarded by *Gale's case*. Changes referable to the inherent nature of the property given are to be taken into account but not other changes. Thus, redemption of a debenture is referable to its nature but the donee's sale of a debenture is not". *Ibid.*